Denzil S. Alkire, a sole proprietorship; Upshur Enterprises, Inc.; and Mountaineer Hauling & Rigging, Inc. *and* United Mine Workers of America, District 31, Local No. 2028. Case 6-CA-11190

February 1, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 24, 1979, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

As more fully described by the Administrative Law Judge, the record shows that, from approximately December 1974 until December 15, 1977, Denzil S. Alkire (Alkire) operated a trucking business as an individual proprietorship hauling coal, rock, and other materials in the Buckhannon, West Virginia, area. Alkire's business consisted of hauling materials under nonunion conditions until 1975, when Alkire began hauling coal for the Badger Coal Company (Badger). This work for Badger soon accounted for 90 percent of Alkire's operations. Alkire's drivers became union members and were covered by the terms of Badger's contract with the United Mine Workers (UMW) when they hauled coal from union mines. Alkire's mechanics and other shop employees were not covered by the union contract.

On September 15, 1977, the same day that a grievance by Alkire's employees alleging that they were not receiving union scale was adjusted, Alkire formed Upshur as a corporation. Following the commencement of a strike by Alkire's employees on December 6, 1977,[1] and Alkire's announced dissolution of "D. S. Alkire Trucking" and termination of Alkire's employees on December 15, 1977, the Upshur corporate entity became involved in operating the trucking business on approximately January 1, 1978.

It was on this same date, approximately January 1, 1978, that Dennett Houdteshell verbally agreed to take over the trucking business from Alkire. However, it was not until February 8, 1978, that Mountaineer (formed by Owner-President Houdteshell) was incorporated or until March 27, 1978, that an agreement of sale was executed by Alkire with Houdteshell for Mountaineer. This written agreement was conditioned upon Houdteshell's obtaining a loan for the purchase price from the Small Business Administration and private banks. Pending the consummation of the sale, Houdteshell leased the business from Alkire.

The complaint allegations to which the General Counsel's exceptions are directed involved certain actions taken by Respondents because the employees engaged in a strike. Specifically, these allegations are that Respondents violated Section 8(a)(1) and (3) of the Act by requiring the employees to file new employment applications as a condition of employment and by failing to recall certain employees, and delaying the recall of other employees, who were economic strikers and who had made unconditional offers to return to work. The alleged requirement to file new employment applications occurred on February 8, 1978, and the failures or delays in reinstatement occurred after the strike ended on March 27, 1978.

The Administrative Law Judge found that in December 1977 Alkire terminated his employees for a nondiscriminatory and lawful reason; namely, because he was going out of business. He went on to point out that an employer has an absolute right to go out of business regardless of the motivation and found that the evidence fails even to demonstrate a discriminatory motive. In addition he found that, as Alkire lawfully terminated his employees in December 1977, Upshur and Mountaineer could lawfully require former employees of Alkire to file new job applications as a condition of employment. In view of those findings, the Administrative Law Judge found that it becomes immaterial whether Mountaineer was a successor employer because, since Alkire did not commit any unfair labor practices for which Mountaineer could be held liable, Mountaineer owed no greater legal obligation to Alkire's former employees than it did to any other prospective job applicants. Hence, the Administrative Law Judge found that the remaining questions for consideration were—and limited his discussion to—whether Straight, acting on behalf of Mountaineer, failed or refused to hire any of the alleged discriminatees because of their union or concerted

[1] On December 6, 1977, the National Bituminous Coal Agreement of 1974 expired by its terms, and the United Mine Workers engaged in an industrywide strike which lasted until approximately March 27, 1978, when a new contract was negotiated. In early April there was a wildcat strike at Badger, and as a result Badger did not resume full operations until middle or late April 1978. The events involving Respondent's employees essentially paralleled these dates.

activities and, if so, whether Alkire and/or Upshur were also responsible for such conduct.

For reasons discussed below, we find that the Administrative Law Judge failed to analyze properly the complaint allegations. Central to these allegations is whether an *alter ego* relationship existed among Alkire, Upshur, and Mountaineer. While the Administrative Law Judge paid lip service to the General Counsel's *alter ego* contentions,[2] he failed to examine fully the relationship among the Respondents during the critical period from January 1, 1978, until August 1, 1978. Thus, he found that "Upshur and Mountaineer were joint employers, and therefore that both were responsible for any personnel actions which were taken during this period." But he failed to examine fully the complaint allegation that Upshur was a successor and *alter ego* of Alkire, or that Mountaineer was a successor and *alter ego* of Alkire and Upshur.

The legal principles to be applied in determining whether two factually separate employers are in fact *alter egos* are well settled. Although each case must turn on its own facts, we generally have found *alter ego* status where the two enterprises have "substantially identical" management, business purpose, operation, equipment, customers, and supervision, as well as ownership.[3] There is no room for disagreement on this record regarding the substantially identical business purpose, operation, equipment, and customers of Alkire, Upshur, and Mountaineer. Thus we shall concentrate our discussion on the management, supervision, and ownership of these three named Respondents.

Denzil Alkire operated his trucking business as a sole proprietorship until December 15, 1977. Beginning in January 1978, Upshur, which Denzil Alkire formed in September 1977, became involved in the operation of the trucking business.[4] At all times material here, Denzil Alkire and his family owned and controlled Upshur. Thus, it is plain that control of the trucking business did not change in January 1978 and that Upshur was a successor and *alter ego* of Alkire.[5]

Although the relationship between Alkire-Upshur and Mountaineer is more complex, the economic realities of the relationship demonstrate that Houdteshell and Straight were essentially the managers of, and Mountaineer was the *alter ego* of Alkire-Upshur with respect to, the trucking business during the times material here. In reaching this conclusion, we have relied on the following record evidence.

The record shows that Mountaineer was able to "lease" Alkire's business for 6 months without ever investing any of its own capital or acquiring a real financial interest in the business assets. Thus, Mountaineer made no downpayment or deposit on the business equipment and facilities.[6] Mountaineer was not required to invest any of its own capital in rental payments. Mountaineer was not required to pay other business expenses such as license fees, property taxes, truck insurance, and maintenance costs. Other expenses were deducted from business receipts before the profits were remitted to Alkire. In contrast to Mountaineer's noninvestment of financial resources in the business, Alkire "loaned" Mountaineer $12,000 to cover the first payroll, purchased new equipment in the name of Upshur, and co-signed for 10 new trucks purchased in Mountaineer's name.

Nor did Mountaineer reap any of the benefits associated with business ownership. Instead, Houdteshell, Mountaineer's owner and president, received a $400 a week salary which was deducted from the receipts as an operating expense. In effect, Houdteshell received a guaranteed salary without regard to having any profits to draw on.[7] By contrast, Alkire received the same salary as Houdteshell and the lease provided that Alkire would receive 100 percent of the net profits.

Although there are no written provisions in the lease agreement governing the manner in which Alkire's trucking business was to be operated by Mountaineer, the record reveals that Alkire continued to play a substantial role in the actual operation of the business during the period when the alleged discrimination against Alkire's employees took place. Thus, Alkire computed or helped compute job bids. Alkire purchased supplies. Alkire

[2] The Administrative Law Judge found that "as the General Counsel correctly points out in his brief, in order to determine the status of the alleged discriminatees, it is first necessary to examine the relationships among the three Respondents during the critical period from mid-December, when Alkire sent the termination letters to his employees, until July 22, when H & A purchased the business."

[3] *Crawford Door Sales Company, Inc.*, 226 NLRB 1144 (1976). Also see *Big Bear Supermarkets #3*, 239 NLRB 179 (1978); *Edward J. White, Inc., and its alter ego, Repairs, Inc.*, 237 NLRB 1020 (1978); *Ramos Iron Works, Inc., and Rasol Engineering*, 234 NLRB 896 (1978); *Co-Ed Garment Company and its Alter Ego Delta Manufacturing Corporation*, 231 NLRB 848 (1977).

[4] The management and supervision of Upshur rested in the hands of Denzil Alkire, Houdteshell, and Straight. Houdteshell had been a driver for Alkire prior to December 1977 and was in charge of the business while Alkire was in Florida in January 1978. Straight had been Alkire's dispatcher with some supervisory responsibilities. It will be recalled that, during the first quarter of 1978, the hauling business consisted of nonunion jobs until the strike was settled.

[5] *Associated Transport Company of Texas, Inc., and Transamerica Transport, Inc.*, 194 NLRB 62, 63 (1971).

[6] By contrast Alkire's sale to H & A included a $50,000 downpayment and specified monthly payments against a deed of trust held by Alkire.

[7] Compare *Big Bear Supermarkets*, 239 NLRB at 182 (Holmes' "Draw on Anticipated Profits").

Alkire testified that Houdteshell was to receive "a fair salary and not an excessive amount because I didn't want to delete [sic] any of the assets of the company."

sought and obtained financing and permits from the State of West Virginia to operate the trucks remaining in Alkire's name. Although Straight handled labor relations matters for Mountaineer, the record shows that Alkire recommended that at least one employee be hired and he was consulted before another employee was placed on the payroll. In short, Alkire continued to have influence and played a substantial role in the operation of the trucking business from his position as salaried consultant during the time that Upshur and Mountaineer were operating the trucking business.

On the record as whole, we find that Houdteshell's position was essentially that of a manager of the trucking operations, that Alkire-Upshur and Mountaineer were joined in a single integrated business, and that Mountaineer was Alkire's *alter ego* at least during the period the lease was in effect. In so finding we rely on the substantially identical business purpose, operation, equipment, and customers of Respondents, Alkire's role in the actual operations of Mountaineer, and, particularly, the economic realities of the lease agreement whereby Mountaineer invested no capital and Alkire retained all the financial risks and received all the profits which demonstrated that Mountaineer was directly or indirectly subject to the economic power of Alkire.[8]

It is plain from the foregoing findings and the record as a whole that this is not a case involving, simply, an employer's right to go out of business. Thus, Alkire did not sell his trucking business until July 1978 and then he sold not to Mountaineer but to H & A. Until that time, Alkire continued to own all the assets and received all the profits from the business. Although Alkire made an oral agreement to sell the business to Houdteshell in January 1978, the business continued to operate under the Upshur name, Alkire's *alter ego*, at least until March 27, 1978. Thus, the Administrative Law Judge found, properly, that "during the period from February 8 to March 27, when the business as being operated and managed by Houdteshell and David Straight, in the name of Upshur, that Upshur and Mountaineer were joint employers, and therefore were both responsible for any personnel actions which were taken during this period."

The alleged unlawful conduct involving the requirement that Alkire's employees file new job applications as a condition of employment with Mountaineer occurred in this period, during which, as the Administrative Law Judge properly found, Upshur and Mountaineer were joint employers. Despite his finding that Upshur and Mountaineer were "both responsible for any personnel actions taken during this period," the Administrative Law Judge failed to consider that Upshur was an *alter ego* of Alkire, and consequently failed to analyze the effect of Alkire's involvement in the personnel action of the joint employers.

It is well established that an *alter ego* has the same obligation to employees as the original employer. We have found that the record evidence here establishes that Upshur was a successor and *alter ego* of Alkire and that Mountaineer was a successor and *alter ego* of Alkire and Upshur. Thus, regardless of whether Alkire's layoff or termination of his striking employees in December 1977 violated the Act,[9] it is plain that Upshur and Mountaineer violated Section 8(a)(1) and (3) of the Act by requiring in February 1978 the striking Alkire employees to file new job applications as a condition of employment.[10]

Finally, we turn to the complaint allegation that Mountaineer violated Section 8(a)(1) and (3) of the Act by failing to recall certain Alkire employees who were economic strikers and who made unconditional offers to return to work. The record shows that, within a short time after the strike ended on March 27, Mountaineer switched 12 drivers who had been working nonunion jobs to the union jobs of hauling Badger coal. Of these 12 employees 9 were strikers who had applied for reinstatement. The other three employees were new hires who had not worked for Alkire at the time of the strike.

The record also shows that 18 of the 26 union drivers employed by Alkire prior to the strike had submitted formal written applications for employment with Mountaineer. Such applications were equivalent to unconditional offers to return to work.[11] In addition, UMW Representative Gary Jordan asked Straight if he intended to employ two other employees who had not submitted applications. Such remarks in the circumstances here indicated that these two employees were interested in

[8] *Big Bear Supermarkets, supra; Am-Del-Co., Inc.*, 225 NLRB 698, 701 (1976); *Marquis Printing Corporation*, 213 NLRB 394, 401 (1974).

The Administrative Law Judge found that Denzil Alkire consistently acted in the manner of a person who wished to get out of business as soon as possible and whose continuing involvement in the business was for the purpose of preserving a saleable asset until the sale could be consummated. However, the gravamen is, as Alkire acknowledged in his testimony, that Alkire maintained control of the business. Absent an arm's-lengths transaction, Alkire and its *alter ego* effectively remained a single employer for the purposes of this proceeding.

[9] No exceptions were filed to the Administrative Law Judge's dismissal of the complaint allegations that Alkire violated the Act by discriminatorily laying off his employees on or about December 6, 1977.

[10] *Atlantic Creosoting Company, Inc.*, 242 NLRB 192 (1979) (Member Jenkins dissenting on other grounds).

[11] Cf. *K-D Lamp Company*, 229 NLRB 648, 649 (1977) (employees signed a recall list); and *Donelson Packing Co., Inc. and Riegel Provision Company*, 220 NLRB 1043, 1049-50, 1057 (1975) (employees filled out job applications).

returning to work and satisfied the requirement of unconditional offers to return.[12]

As an *alter ego* of Alkire-Upshur, Mountaineer had the same obligation to reinstate economic strikers as Alkire.[13] Thus, any economic striker who made an unconditional offer to return to work must be reinstated to his former position, unless he has been permanently replaced or some other legitimate business reason for the refusal to reinstate exists.[14] The burden of proving the permanent replacement or other business justification is on Respondents here.[15]

The General Counsel established a *prima facie* case by showing that: (1) the alleged discriminatees participated in a lawful economic strike, and (2) upon the employees' unconditional offer to return, Respondents refused to offer certain of them reinstatement to their former positions, or their substantial equivalents. At this point the burden shifted to Respondents to prove that they had legitimate and substantial business justification for failing to reinstate the employees.

Respondents did not contend, as an affirmative defense, or present evidence to show, that the employees named in the complaint were not reinstated because they had been permanently replaced.[16] Nor have Respondents presented evidence as to why they failed to resume work at pre-strike levels with a full employee complement.[17] Accordingly, we find on the record before us that Respondents have failed to satisfy their burden of providing evidence that they had legitimate and substantial business justification for failing to reinstate the employees named in the complaint.[18]

CONCLUSIONS OF LAW

1. Denzil S. Alkire, a sole proprietorship, and its *alter ego* Upshur Enterprises, Inc., as well as Upshur Enterprises Inc., and its *alter ego* Mountaineer Hauling & Rigging, Inc., constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Mountaineer Hauling & Rigging, Inc., is the *alter ego* of Upshur Enterprises, Inc., in the operation of Respondents' trucking operations in the Buckhannon, West Virginia, area.

3. United Mine Workers of America, District 31, Local No. 2028, is a labor organization within the meaning of Section 2(5) of the Act.

4. By conditioning reinstatement of striking employees upon their submitting a new application form, Respondents engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. By unlawfully refusing to reinstate certain employees, and by delaying the reinstatement of certain other employees, named below, Respondents engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondents did not violate the Act by any conduct not found herein to constitute an unfair labor practice.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, we shall order them

[12] *Kentron of Hawaii Ltd., Subsidiary of LTV Aerospace Corporation*, 214 NLRB 834, 841-842 (1974); *Kelso Marine, Inc., Kel Stress Division*, 199 NLRB 7, 13 (1972).

[13] The Administrative Law Judge's discussion of Respondent's treatment of the Alkire employees for the purpose of recall and reinstatement following the conclusion of the strike on March 27 is misplaced. The Administrative Law Judge delved into whether Mountaineer refused to hire Alkire employees discriminatorily. Finding no discrimination, he found it unnecessary to determine whether Alkire was a joint employer with Mountaineer.

The first issue the Administrative Law Judge should have considered was the relationship of Mountaineer to Alkire-Upshur. Thus, since the record shows that Mountaineer was an *alter ego* of Upshur, Mountaineer had the same obligation to the striking employees as Alkire. *The Bell Company, Inc., etc.*, 225 NLRB 474 (1976); *Helrose Bindery, Inc. and Graphic Arts Finishing, Inc.*, 204 NLRB 499 (1973); and *Loren Service, Inc., Draber Press, Inc., Bernard Dramen and Harold Berman*, 208 NLRB 763 (1974).

[14] *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967); *Bushnell's Kitchens, Inc.*, 222 NLRB 110 (1976).

[15] *N.L.R.B.* v. *Fleetwood Trailer Co., supra* at 378, where the Supreme Court described the principles controlling reinstatement rights of unreplaced economic strikers as follows:

> Section 2(3) of the Act . . . provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by Secs. 7 and 13 of the Act . . . . Under Section 8(a)(1) and (3) . . . it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, *unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. N.L.R.B.* v. *Great Dan Trailers*, 388 U.S. 26, 34 (1967). *The burden of proving justification is on the employer.* [Emphasis supplied.]

[16] As described above, Mountaineer moved 12 employees from nonunion jobs to union jobs after March 27, 1978, when the strike ended and union work resumed. Among these 12 employees were 3 employees who had not worked for Alkire. It is apparent that these three new employees were not hired as permanent replacements for union jobs, which resumed after March 27, prior to the unconditional offers to return to work on February 1978 by the employees named in the complaint.

[17] The Administrative Law Judge described in detail the various reasons offered by Respondents for refusing to reinstate the employees named in the complaint. Such reasons ranged from lack of education or poor driving record to failure to file a job application or simply forgetting the employee. But such reasons had no bearing on economic decision to eliminate certain strikers' jobs. See *Pillows of California*, 207 NLRB 369 (1973). See also fn. 18, *infra*.

[18] Houdteshell testified that Mountaineer did not have any duty to rehire any of the Alkire employees. Although Houdteshell's misplaced view of Mountaineer's obligation to Alkire's employees offers some explanation, it offers no excuse for Respondents' failure to present evidence of legitimate and substantial business justification for failing to reinstate the employees named in the complaint.

to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Respondents violated Section 8(a)(1) and (3) of the Act by unlawfully failing and refusing to recall John Courtney, Larry Courtney, Ogden Bragg, William Davis, Harvey Lattea, Bob Small, Larry Lantz, and James Detamore and by delaying the recall of John McNeely from March 27, 1978, to May 19, 1978. The General Counsel concedes that Alkire's sale of the trucking business to H & A, an event which terminated backpay, was an arm's-length transaction and he requests backpay only until August 1, 1978.[19] Accordingly, we shall order Respondents to make whole the named employees for any loss of earnings and other benefits suffered as a result of Respondents' discrimination against them. The loss of earnings shall be computed as set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[20] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). We shall also order that Respondents mail a copy of the attached notice to each employee who was on their payroll as of August, 1978, as well as to the named discriminatees, at their last known mailing address as shown in Respondents' records.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Denzil S. Alkire, a sole proprietorship; Upshur Enterprises, Inc.; and Mountaineer Hauling & Rigging, Inc., Buckhannon, West Virginia, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unilaterally requiring striking employees to execute new job application forms as a condition of employment.

(b) Discouraging membership in any labor organization by unlawful discrimination in regard to hire or tenure of employment or any term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Make whole the following employees for any loss of earnings they may have suffered by reason of Respondents' discrimination against them, in the manner set forth as described in "The Remedy" section of this Decision and Order:

John Courtney	Bob Small
Larry Courtney	Larry Lantz
Ogden Bragg	James Detamore
William Davis	John McNeely
Harvey Lattea	

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Mail to all employees who were employed by Respondents as of August 1, 1978, at their last known mailing address copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondents' representative, shall be mailed by Respondents immediately upon receipt thereof.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act other than those found in this Decision and Order.

[19] The precise date that Alkire's sale to H & A became effective is not clear from the record, and shall be resolved in compliance proceedings.

[20] Member Jenkins would compute interest on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

Following a hearing in which all parties had the opportunity to participate and offer evidence, it has been found that we violated the National Labor Relations Act, as amended. We have been ordered to post this notice and to abide by what we say in this notice.

WE WILL NOT require striking employees to execute new job application forms as a condition of employment.

WE WILL NOT discourage membership in any labor organization by discriminating in

regard to hire or tenure of employment or any terms or conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the Act.

WE WILL make whole the following employees for any loss of pay they may have suffered as a result of the discrimination against them, plus interest:

John Courtney	Bob Small
Larry Courtney	Larry Lantz
Ogden Bragg	James Detamore
William Davis	John McNeely
Harvey Lattea	

DENZIL S. ALKIRE, A SOLE PROPRIETORSHIP; UPSHUR ENTERPRISES, INC.; AND MOUNTAINEER HAULING & RIGGING, INC.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: This case was heard at Buckhannon, West Virginia, on December 21 and 22, 1978. The charge and amended charge were filed, respectively, on April 24 and July 3, 1978, by United Mine Workers of America, District 31, Local No. 2028 (herein the Union). The complaint, which issued on July 6, 1978, and was amended on November 3, 1978, alleges that Denzil S. Alkire, a sole proprietorship, Upshur Enterprises, Inc., and Mountaineer Hauling & Rigging, Inc. (herein respectively Alkire, Upshur, and Mountaineer and collectively Respondents), violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended. The gravamen of the complaint is that Upshur and Mountaineer were and are successors to and/or *alter egos* of Alkire, that Alkire laid off and purported to terminate employees John Courtney, John McNeely, Larry Courtney, Larry Lantz, James Detamore, Harvey Lattea, Ogden Bragg, William Davis, and Robert Small, because of their union and concerted activities, that Alkire and Mountaineer discriminatorily required them to file new employment applications as a condition of employment, and that Respondents discriminatorily delayed in recalling from layoff and reinstating John McNeely and John Courtney, and discriminatorily failed and refused to recall or reinstate the other alleged discriminatees. Respondents by their respective answers deny *alter ego* or successor status, and deny the commission of the alleged unfair labor practices.

All parties were afforded full opportunity to participate, to present relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Upon the entire record in this case[1] and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

From about December 1, 1974, until about December 15, 1977, Denzil S. (Chub) Alkire operated at his office and place of business in Buckhannon, West Virginia, a trucking business as an individual proprietorship hauling coal, rock, and other materials by truck in and around Buckhannon, for customers including Badger Coal Company (herein Badger). Upshur, a West Virginia corporation, was formed in September 1977 and at all times material was wholly owned by the Alkire family. The nature of its activities will be discussed, *infra*. Mountaineer, also a West Virginia corporation, was incorporated on February 8, 1978, and until October 2, 1978, was wholly owned by Dennett (Slim) Houdteshell, who was its president. In 1978 Mountaineer was engaged at Buckhannon in the business of hauling coal, rock, and other materials by truck for enterprises including Badger. During 1977, Alkire, in the course and conduct of its business operation, provided services to Badger, from which Alkire derived gross income in excess of $50,000. During 1978, Mountaineer in the course and conduct of its business operation provided services to Badger, from which services Mountaineer derived gross income of $50,000. During 1977 and 1978 respectively, Badger purchased and received goods and materials valued in excess of $50,000 directly from suppliers located outside the State of West Virginia for use within West Virginia. During the same period of time, Badger sold, shipped, and delivered goods and materials valued in excess of $50,000 to enterprises located outside West Virginia from its facilities located within West Virginia. I find that, at times material to this case, Alkire and Mountaineer were employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it would effectuate the purposes of the Act for the Board to assert its jurisdiction in this case.

II. THE LABOR ORGANIZATION INVOLVED

The evidence adduced in this case indicates that the Union is an organization in which employees participate and which exists for the purpose, in whole or part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, and conditions of work. I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Developments up to December 6, 1977*

Prior to 1975, Alkire engaged in hauling on a relatively small scale, and his business substantially consisted of hauling material under nonunion conditions. However, in 1975 Alkire began hauling coal for Badger. Badger's employees were covered by the United Mine Workers (UMW) National Bituminous Coal Wage Agreement of

[1] The official transcript of proceedings is hereby corrected.

1974. Therefore, as Alkire's driver employees were hauling coal from union mines, they became covered by the terms of that agreement when they performed such work. Alkire either was or became a signatory to the UMW agreement. Badger coal hauling soon accounted for more than 90 percent of Alkire's operations. Alkire's drivers became union members, and the Union functioned as their collective-bargaining representative. Alkire's mechanics and other shop employees were deemed by the Union as being engaged in work at a nonunion location, and therefore were not covered by the UMW agreement. Alkire also utilized the services of owner-operators who were covered by the agreement when hauling Badger coal.

Alkire soon ran into a serious problem. In order to obtain a contract to haul Badger coal, he agreed to a price which precluded him from paying tbe UMW agreement wage scale without operating at a loss.[2] Alkire's drivers repeatedly complained that they were not receiving union scale. Alkire raised their hourly wage from time to time, in response to their complaints, but their pay scale remained below the union rate. On September 12, 1977,[3] 10 of Alkire's drivers filed a written grievance, alleging that they were not receiving union scale, and wished to be made whole. At the time, Alkire had about 26 driver and equipment operator employees who were covered by the UMW contract. The grievance was signed by six of the alleged discriminatees in this case (Robert Small, John Courtney, Larry Courtney, Jim Detamore, John McNeely, and Larry Lantz) and four employees who are not alleged as discriminatees (Bruce Davis, John Helmick, George Jack, and Kenny Lee). The grievance was signed and endorsed by the Union's mine committee, which consisted of employees Ogden Bragg, Don Parks, and Don Oldaker. Of these, only Bragg is alleged as a discriminatee. Employees William Davis and Harvey Lattea are also alleged as discriminatees, although their names do not appear on the grievance.

In response to the grievance, Alkire admitted that he was paying below union scale, but asserted that his drivers had agreed to accept subscale wages. He insisted that he could not pay union scale and still afford to remain in business. The employees met with Alkire, and also met among themselves and with UMW District 31 Representative Garry Jordon. The employees voted unanimously to demand union scale. Indeed, they indicated their sentiments to Alkire. When Alkire told the assembled employees that he could not afford to operate under union scale, they responded with applause. Jordon was evidently understanding of Alkire's plight, but in view of the employees' position, he indicated to Alkire that he had no alternative but to insist upon union scale. On paper, the grievance was informally resolved by Alkire's agreement to abide by the UMW contract. In fact, Alkire gave his employees a 50-cent-per-hour increase, which still left them below union scale. Some of the employees expressed willingness to go along with this arrangement until a new rate could be negotiated, while others were outspokenly dissatisfied. Alkire's dispatcher, David Straight, who even then performed some functions of a supervisory nature, was aware that such differences existed. However, with only a few exceptions, which will be discussed, the record does not indicate which employees expressed such views. The evidence also does not indicate that any employee quit, went on strike, filed a grievance, or took any other action in protest of the continuing *ad hoc* arrangement.[4]

On September 15, the same day that the grievance was adjusted, Alkire formed Upshur as a corporation. However, Alkire continued to run his trucking business as an individual proprietorship until he shut down operations in December. The Upshur corporate entity did not become involved in the trucking business until January 1. William Davis, who was a committeeman in 1976 and early 1977, testified that in June 1977 Alkire told him that he was going to form a corporation to get rid of the troublemakers. Alkire testified that he may have told Davis that he was forming a new corporation, but that the purpose was to handle other, nontrucking operations. I am not persuaded that either testimony reflects the real reason why Alkire formed Upshur. As will be discussed, I have not found Davis to be a credible witness as to the reason why he did not file a job application with Mountaineer in the spring of 1978. If in June 1977 Alkire referred to a corporation such as Upshur, then it is difficult to see how Alkire could have expected to get rid of "troublemakers" that way, since the corporation would have been owned, operated, and controlled by Alkire. It is unlikely that Alkire would have referred to a corporation such as Mountaineer; i.e., a corporation owned by other persons. The evidence fails to indicate that, in June 1977, Alkire contemplated selling his trucking business, or that he reasonably could have foreseen the developments which led to his transaction with Dennett Houdteshell and the formation of Mountaineer. The timing of Alkire's action indicates that, in fact, Alkire formed

[2] Evidence adduced at the hearing indicates that this is not an unusual situation in the coal hauling business. As will be discussed, when Houdteshell failed to obtain a loan with which to purchase Alkire's business, Alkire sold the business to H & A Coal Hauling, Inc., which temporarily hauled coal for Badger. However, Badger refused to award a contract to H & A because H & A's bid was too high. Thereafter, the coal was hauled by owner-operators.

[3] All dates herein refer to the period from September 1, 1977, through August 31, 1978, unless otherwise indicated.

[4] Alkire and Upshur contend that, in determining whether Respondents unlawfully terminated or refused to recall or reinstate the alleged discriminatees, I cannot consider the events concerning the September grievance, e.g., on such questions as motive, animus, and knowledge of union or concerted activity, because the events occurred more than 6 months prior to filing of the instant charges. The difficulty with this argument is that the General Counsel's case is not "inescapably grounded" on evidence concerning the grievance or other matters predating the limitation period. *Local Lodge No. 1424, International Association of Machinists [Bryan Manufacturing Co.]*, 362 U.S. 411, 422 1960). Here, the General Counsel contends that discriminatory motive is also shown by evidence within the limitation period, e.g., alleged pretextual reasons for refusing to recall the alleged discriminatees, and statements made during that period, and that, apart from motive, the alleged discriminatees were denied their recall rights as economic strikers. Therefore, events predating the limitations period may, if relevant, be fully considered as evidence on the merits of the complaint. *Paramount Cap Manufacturing Co.*, 119 NLRB 785 (1957), enfd. 260 F.2d 109, 112–113 (8th Cir. 1958); see also *N.L.R.B. v. Carpenters District Council of Kansas City and Vicinity, AFL-CIO [J. E. Dunn Construction Co.]*, 383 F.2d 89, 95–96 (8th Cir. 1967).

Upshur as a means of protecting himself from personal liability in the event that his business was forced by legal action or otherwise to pay the UMW contract wage rate. Indeed, Alkire anticipated that such action would cause him to operate the business at a loss. As will be discussed, when the business was temporarily operated in the Upshur name, it was done for a similar reason; namely, to protect Alkire from personal liability at a time when Alkire was no longer actively involved in running the business.

On December 6, the National Bituminuous Coal Agreement of 1974 expired by its terms, and United Mine Workers engaged in an industrywide strike which lasted until on or about March 27, when a new contract was negotiated. In early April there was a wildcat strike at Badger, and as a result Badger did not resume full operations until mid- or late April. The complaint alleges that, on or about December 6, Alkire laid off the alleged discriminatees, that they commenced a strike, and that Alkire took such action in violation of Section 8(a)(1) and (3) of the Act. Alkire and Upshur, in their answer, admit that the employees went on strike, but deny that they were laid off. No evidence was presented as to the circumstances under which the employees ceased working for Alkire on December 6. Consequently, the pertinent allegations of the complaint can be sustained only to the extent admitted by Alkire. I find that, as of December 6, Alkire's employees were engaged in an economic strike over the terms of a new UMW contract. The allegation that Alkire discriminatorily laid off his employees on December 6 is both misleading and incomprehensible. It is evident that, even if Alkire's employees did not go on strike, Alkire would have been forced to lay them off because of the shutdown of Badger's mines, which accounted for nearly all of his business. Therefore, I am recommending that the allegation that Alkire discriminatorily laid off his employees on or about December 6 be dismissed.

B. *Developments After December 6, 1977*

In mid-December, Alkire sent a letter to each of the union-represented employees, informing them that "as of December 15, 1977, D.S. Alkire Trucking has been dissolved and gone out of business." Alkire added that he was negotiating with a corporation which was interested in leasing or purchasing some of his equipment, and that the corporation might be interested in hiring people to operate the equipment. Alkire testified that, when the strike began, he decided to go out of the hauling business because he was unable to make a profit. Alkire testified that he promptly set about looking for a purchaser. He contacted several prospective purchasers, but decided against an outright sale of the equipment because this would result in a permanent loss of jobs in the community. Alkire then turned to Dennett Houdteshell, one of his drivers. Houdteshell had about 15 years' experience in handling trucks and heavy equipment, both as an owner and as an employee.He had recently fallen on evil days, having served a prison term for receiving and selling stolen goods. Alkire and Houdteshell discussed, negotiated, and arrived at the terms of an agreement. Alkire agreed to sell his trucking business to Houdteshell for $250,000. Houdteshell then applied for a Small Business Administration rehabilitation loan in order to finance the purchase. It is uncontradicted that the Small Business Administration approved the loan in January 1978, but effective as of July 1978, when Houdteshell's parole period would end. In the meantime, Houdteshell unsuccessfully tried to arrange earlier financing through the sale of land owned by his father-in-law. It is also uncontradicted that, in July 1978, the Small Business Administration unexpectedly refused to grant the loan, because of the present pending unfair labor practice litigation. The General Counsel, in his brief, expresses skepticism that Alkire ever seriously expected to sell his business to a person such as Houdteshell. The General Counsel's position is based more on suspicion than hard evidence. It is evident from the record that coal hauling in and around Buckhannon has typically not been a business for conglomerates or well-established firms. Apart from his unfortunate brush with the law, Houdteshell's experience and qualifications to engage in the coal hauling business were not significantly different from those of Denzil Alkire, who preceded him, or James Lee, who followed him.[5] The General Counsel also attaches significance to the fact that, in July 1978, Alkire had no apparent difficulty in finding a financially able purchaser for the business, i.e., Lee, after SBA disapproved the loan to Houdteshell. However, in July 1978, the business was more marketable than in December 1977. In July 1978 the business was fully operative, whereas, in December 1977, the business was virtually moribound as a result of an industrywide strike which had just begun. From mid-December 1977, until the time of this hearing, more than a year later, Denzil Alkire consistently acted in the manner of a person who wished to get out of the hauling business as soon as possible, and whose continuing involvement in the business was for the purpose of preserving a saleable asset (i.e., the business) until a sale could be consummated. The General Counsel does not contend that the sale of the business to the Lee family corproration, H & A Coal Hauling, Inc. (herein H & A), in July 1978 was anything other than a bona fide arm's-length transaction between Denzil Alkire and James Lee. As of the time of this hearing, Alkire was completely out of the hauling business, and was actively engaged in a different business. However, this is not the end of the inquiry. Rather, as the General Counsel correctly points out in his brief, in order to determine the status of the alleged discriminatees, it is first necessary to examine the relationships among the three Respondents during the critical period from mid-December, when Alkire sent termination letters to his employees, until July 22, when H & A purchased the business.

About January 1, Houdteshell verbally agreed to take over the business from Alkire. However, no contract was executed until March 27. On that date Alkire and Houdteshell (the latter as president of Mountaineer) entered into a written agreement of sale and lease whereby

[5] Indeed, after the loan fell through, Houdteshell sold the Mountaineer name to Lee and went into a different hauling business. Three of the alleged discriminatees (John McNeely, John Courtney, and Larry Courtney) worked for Houdteshell for a time.

Mountaineer agreed to purchase the trucking business from Alkire for $250,000. The parties further agreed that, pending the sale, Alkire would lease the entire business to Mountaineer. The agreement was conditioned upon Mountaineer obtaining a loan for the purchase price from SBA and private banks. Alkire verbally agreed that Houdteshell would have until July 31 to obtain the money. The business included trucks and other equipment which were subject to a total indebtedness of about $700,000. Alkire agreed to make all payments on the outstanding indebtedness, and to pay all license fees, taxes, insurance, and maintenance expenses on vehicles and other equipment, and could claim depreciation. Mountaineer was to pay all operating expenses, including wages. As rent, Mountaineer agreed to pay Alkire 100 percent of the net profit after expenses, which included Houdteshell's salary. The parties orally agreed that Houdteshell would receive a salary of $400 per week. In sum, pending the sale the parties agreed that Houdteshell would receive only a salary from the business. Moreover, Houdteshell was, in substance, although not in form, guaranteed his salary. When the profits of the business were insufficient to meet Houdteshell's salary, Alkire's corporation, Upshur, loaned him money to make up the difference. Houdteshell also withdrew nearly $9,000 from the business, although he did so without Alkire's approval, and Alkire expressed the view that Houdteshell had no right to do this. One accountant maintained the books for both corporations, and she apportioned costs and expenses in accordance with her understanding of the agreement between Alkire and Houdteshell. The agreement further provided that the parties would agree upon an employment contract for Alkire for a period of at least 1 year following consummation of the sale. During the period of the lease Alkire was nominally retained by Mountaineer as a management consultant at a salary of $400 per week, which he received in addition to the net profit of the business, as provided in the agreement.

Until January 1, 1978, the business continued to be maintained in Alkire's name. Alkire retained only his clerical help, and no trucking work was performed during the latter part of December. On January 3, Alkire left for Florida, leaving Houdteshell in charge of the business. Except for a brief trip, Alkire did not return to West Virginia until early February. In the meantime, Houdteshell functioned as a watchman, although he used this dormant period to familiarize himself with the business. Trucking operations did not resume, even on a limited scale, until at least February 8, and during this period Houdteshell and the office personnel were the only functioning employees. From January 1 until the agreement of sale and lease was executed on March 27, the business was conducted in the name of Upshur, and Houdteshell was retained on Upshur's payroll. Alkire testified that he made this arrangement for tax purposes. As indicated, I find that Alkire made this arrangement to protect himself from personal liability at a time when he was no longer actively involved in running the business.

Mountaineer was incorporated on February 8. Houdteshell was its president and David Straight was vice president and general manager. As indicated, Straight had been Alkire's dispatcher. Under Alkire, Straight had some supervisory responsibilities. He directed work and disciplined employees. However, Alkire normally handled hiring and firing of personnel. Straight worked for Alkire until Alkire sent out the termination notices in mid-December. Thereafter, Straight went on the Upshur payroll until February 10, when he began working, at least, nominally, for Mountaineer. Houdteshell placed Straight in complete charge of personnel and dispatching matters, including hiring and firing of employees, while Houdteshell devoted himself primarily to obtaining work for the business. On or about February 10, Straight notified prospective employees of Mountaineer, including the former Alkire employees, that Mountaineer was taking job applications. Straight testified that he did not consider any individual for employment unless the individual filled out a written application. During the period from February 8 until March 27, when the business functioned in the name of Upshur, Straight hired 7 employees for nonunion work (6 garage personnel and 1 driver) and 12 employees for union work; 5 of the 6 nonunion employees and 9 of the 12 union employees were former Alkire employees. None of the 10 employees who initially signed the September grievance were hired during this period. However, Straight hired two of the three committeemen who endorsed the grievance. Donald Parks was hired as a union operator on February 13, and Donald Oldaker as a union driver on March 27. The complaint does not allege that Respondents or any of them unlawfully refused to recall or reinstate the alleged discriminatees prior to March 27. Rather, the complaint alleges, in sum, that on or about December 15 Alkire unlawfully purported to terminate his employees, that on or about February 8 Alkire and Mountaineer unlawfully required them to file new employment applications as a condition of employment, and that since on or about March 27 Respondents have unlawfully failed and refused to recall or reinstate the alleged discriminatees. After March 27 Mountaineer (in whose name the business was thereafter conducted) did not hire any employees for union work. In April and May Mountaineer hired 11 employees for nonunion work, of whom 1, John McNeely, one of the alleged discriminatees, transferred to union work. Also in May, Donald Oldaker transferred from union work to nonunion work. As Badger did not resume full operations until mid- or late April, and Badger comprised most or all of Mountaineer's union work, it is evident that there was not much union work available until at least that time.

I find that in December Alkire terminated his employees for a nondiscriminatory and lawful reason; namely, because he was going out of business. An employer has an absolute right, under the Act, to go out of business regardless of the motivation. *Textile Workers Union of America* v. *Darlington Manufacturing Co.*, 380 U.S. 263, 268 (1965). In the present case, the evidence fails even to demonstrate a discriminatory motive. The fact that Alkire's employees were then engaged in an economic strike did not immunize them against such permissible conduct. I further find that, during the period from February 8 to March 27, when the business was being oper-

ated and managed by Houdteshell and David Straight, but in the name of Upshur, that Upshur and Mountaineer were joint employers, and therefore that both were responsible for any personnel actions which were taken during this period. *Springfield Retirement Residence, a Division of Episcopal Community Services, Inc. and Whelan Food Services, Inc.*, 235 NLRB 884 (1978). As Alkire lawfully terminated his employees in December, Upshur and Mountaineer could lawfully require former employees of Alkire to file new job applications as a condition of employment. Therefore, I find that Alkire did not violate the Act by terminating his employees, and that Upshur and Mountaineer did not violate the Act by requiring those employees to file job applications as a condition of employment.

In view of the foregoing findings, it becomes immaterial whether Mountaineer was a successor employer. As Alkire did not commit any unfair labor practice for which Mountaineer could be held liable, Mountaineer owed no greater legal obligation to Alkire's former employees than it did to any other prospective job applicants. In sum, Mountaineer's sole obligation was to refrain from failing or refusing to hire them for discriminatory reasons. *N.L.R.B.* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 280, fn. 5 (1972). Therefore the remaining questions for consideration are, in sum, whether Straight, acting on behalf of Mountaineer, failed or refused to hire any of the alleged discriminatees because of their union or concerted activities and, if so, whether Alkire and/or Upshur was also responsible for such conduct.

David Straight testified that, in hiring employees for Mountaineer, he considered former Alkire employees. Indeed, most of those hired were former Alkire personnel. Straight testified that, of the three applicants hired for union work who were not former Alkire employees, Houdteshell told him to hire one (Lloyd Burgess), who was Houdteshell's brother-in-law, one (James Davis) was recommended by Alkire, and the third (Kenny Moore) was personally known to Straight. Straight further testified that he did not follow seniority insofar as he hired former Alkire employees. In fact, he was not obligated to do so. No pertinent collective-bargaining agreement was in effect until May, when Mountaineer signed a contract with the Union, and the General Counsel does not contend that Respondents or any of them violated a contractual obligation by failing to follow seniority. As the alleged discriminatees did not enjoy the status of economic strikers after they were lawfully terminated, it follows that the allegations of the complaint must be dismissed as to one of them. Harvey Lattea did not sign the September grievance. He did not begin performing union work until September 1977. Straight testified, without contradiction, that he decided not to hire Lattea because of Lattea's poor driving and performance record. I credit Straight. The General Counsel's case with respect to Lattea rests solely on the contention that Lattea enjoyed the status of an economic striker, and therefore was entitled to be recalled to work ahead of any applicants who were not former Alkire employees. As this contention is without merit in the circumstances of this case, it follows that there was no discrimination with respect to Lattea.

As indicated, William Davis was a former committeeman. However, in September 1977, he was working as a mechanic; i.e., performing nonunion work. He was no longer on the committee and did not sign the grievance. Straight testified that he did not hire Davis because Davis never submitted a written application. Davis, in his testimony, admitted that he did not fill out an application. He testified that he declined to do so because the application form improperly called for financial statements, and the Union agreed. I do not credit this explanation. Union Representative Jordon testified that he advised the former Alkire employees to file applications with Mountaineer, and that he did not tell Davis that the form was illegal. Davis also testified that his son advised him not to sign the application because it called for financial statements. However, Davis' son applied himself for a job with Mountaineer, and was hired. The job application form contains an authorization for Mountaineer to make an investigation of the applicant's financial and credit record. However, a proviso permits the applicant to refuse to complete any portion of the form which the applicant believes to be unlawful. The form itself was based on a form used by Badger. The General Counsel does not contend that Davis was privileged to refuse to file an application because the form contained unlawful inquiries. Rather, the General Counsel's position is based on the contention, which I have rejected, that Davis did not have to file an application because he was already an employee of Mountaineer. I find that Davis declined to file an application because he did not wish to go to work for Mountaineer as a new employee. I also do not regard a conversation between Jordon and Straight in February, and a followup conversation in April, as constituting an application for jobs by Davis and other alleged discriminatees. Jordon testified that in February he spoke to Davis, Ogden Bragg, Larry and John Courtney, Larry Lantz, and three or four other former Alkire employees, who asked if they could be reemployed. Jordon then spoke to Straight. According to Jordon, he asserted that "the contract" had a succession clause, and asked if Bragg, Davis, and the Courtneys had jobs. Straight said they did not. They also discussed whether seniority was followed in a successorship situation. Jordon's testimony concerning the conversation was substantially uncontroverted. It is evident that Jordon was suggesting, without flatly asserting, that the former Alkire employees were entitled to be rehired, and that Straight disagreed with the suggestion that they were laid-off or striking employees of Upshur or Mountaineer who enjoyed rights of recall or reinstatement. As Jordon admittedly advised the former Alkire employees to file applications with Mountaineer, it is evident that Jordon did not press this position. I am also not persuaded that Straight used Davis' failure to file an application as a pretext for not hiring. No evidence was presented, other than hearsay, that Straight hired employees who did not submit applications. Straight wished to make his own decisions as to whom to hire and whom not to hire, and he could reasonably infer that any individual who did not file an ap-

plication with Mountaineer was not interested in a job.[6] I find that there was no discrimination with respect to Davis.

Ogden Bragg took an application form from Straight but never returned it. Straight testified that he also would not have hired Bragg because of his disciplinary record. When they worked for Alkire, Straight gave Bragg a suspension because Bragg walked off a job in the middle of the day. Bragg was not presented as a witness, and Straight's testimony concerning the incident is uncontroverted. If Straight were discriminatorily motivated, then it is difficult to see why he would have refused to hire Bragg while hiring the other two committeemen who endorsed the September grievance.[7] I find that there was no discrimination with respect to Bragg.

John McNeely filed a job application with Mountaineer. David Straight testified, in sum, that he initially did not hire McNeely because he tended to be lazy, and there were better driver applicants available. However, by May Mountaineer needed more drivers, and by then McNeely was one of the better applicants available. McNeely was hired on May 15 as a nonunion driver, but on May 19 he was switched to union work. McNeely testified that Houdteshell and Straight told him that they needed more trucks to haul union coal, asked him if he wanted to do union work, said that they were paying $7 per hour, which was $1.87 below the UMW contract rate, and added that if there was any more trouble from the union men, they would be taken out of the Union and made nonunion. Houdteshell testified that he never discussed the Union with McNeely or said that he would get rid of the union people if they caused trouble. However, Straight testified that Houdtshell called a meeting of the drivers and asked them if they were willing to agree to a rate of $7 per hour. Straight testified that the drivers agreed to accept the $7 rate and that, when McNeely transferred to union work, he also agreed to accept the $7-per-hour rate. I credit McNeely to the extent that I find that, whatever words were used by Houdteshell and Straight, they indicated that they would not pay the UMW contract rate for union work, and that any driver who insisted on receiving the contract rate would be transferred to nonunion work. However, this is not the thrust of the complaint. The complaint does not allege that Respondents or any of them violated the Act by conditioning assignment of the employees to union work on a wage rate less than union scale. In fact, the evidence indicates that throughout the operations in the Buckhannon area the Union consistently tolerated payment of subscale wages for hauling union coal, while giving only lip service to the contract rate. Thus, in late May, after Mountaineer made clear that it would pay only $7 per hour to its union drivers, the Union agreed to permit Mountaineer to become a signatory to its contract, thereby permitting Mountaineer to haul coal for Badger. Rather, the thrust of the complaint is that Respondents refused to hire (or recall or reinstate) the former Alkire employees, or delayed doing so, because of their past activities in protesting Alkire's failure to pay the contract rate. I am not persuaded that the evidence so indicates with respect to McNeely. Straight and Houdteshell hired McNeely before they knew whether or not he would accept less than the contract rate. Indeed, they hired McNeely at a crucial time, when Badger was resuming full operations and the Union had not yet agreed to sign a contract with Mountaineer. If Mountaineer was concerned that McNeely would insist on the contract rate, and discriminatorily sought to head off that possibility, then it is more probable that McNeely would not have been hired at all.[8] However, as has been and will be discussed, Mountaineer hired a number of former employees who signed the September grievance. I find that Mountaineer did not discriminatorily refuse to hire McNeely.

David Straight testified that, among the September grievants, John Courtney wanted an immediate increase, while Larry Courtney leaned toward a temporary accommodation with Alkire. Both filed applications with Mountaineer. Both were hired, not immediately, but eventually. Straight testified that he did not hire John Courtney because he felt that he would not make a good employee, that he had a bad driving record and a poor attitude. In late May John Courtney had a chance encounter with Denzil Alkire. Courtney asked what the chances were of working for Mountaineer. Alkire said that they did not need any union drivers. Courtney asked about nonunion work, and Alkire said he would see what could be worked out. At Alkire's suggestion, Courtney went to Straight and Houdteshell. Straight was still unwilling to hire Courtney, but he was overruled by Houdteshell, who instructed him to hire Courtney. Houdteshell testified that he considered Courtney to be a very good driver. Courtney testified that while driving for Alkire he received only one traffic ticket (for overloading) and was never reprimanded for poor driving. However, Courtney was involved in an accident in September in which his truck was demolished. But for the developments in May, the evidence might suggest that Straight was advancing pretextual reasons for refusing to hire Courtney, and might warrant an inference that Straight

[6] The cases cited by the General Counsel on this point in his brief are distinguishable. In *Macomb Block and Supply, Inc.*, 223 NLRB 1285, 1286 (1976), reversed 570 F.2d 1304 (6th Cir. 1978), the Board held, in sum, that an employer cannot refuse to hire prospective employees on the ground that they did not file formal applications, if the evidence indicates that the application requirement was part of a discriminatory scheme to deny them employment. This rule was applied in *Mason City Dressed Beef, Inc., and Packing House and Industrial Services, Inc.*, 231 NLRB 735, 748 (1977), enfd. in pertinent part 590 F.2d 688, 695-696 (8th Cir. 1978). The General Counsel's reliance on these cases begs the question. Absent evidence of an unlawful motivation, Mountaineer could lawfully require prospective employees to file individual job applications.

[7] Bragg strongly supported the grievance, while Donald Parks had some reservations. However, all three committeemen signed and endorsed the grievance.

[8] The General Counsel presents inconsistent arguments in this regard. On the one hand, the General Counsel contends that Mountaineer discriminated against some former Alkire employees by hiring them for nonunion work. On the other hand, the General Counsel argues that Mountaineer discriminated against William Davis, who was performing nonunion mechanic work for Alkire in December, by refusing to hire him for any job. This is a case of "damned if you do and damned if you don't." In order to accept the General Counsel's position, I would have to find that Mountaineer acted discriminatorily by failing to hire grievants to 7 of the 12 available union jobs (or 8, if Davis were included), although the alleged discriminatees comprised only a minority of Alkire's union employees, and an even smaller minority of Mountaineer's job applicants.

was refusing to hire Courtney because of Courtney's previous insistence on the contract rate. However, if Straight were following a policy of refusing to hire grievants or adamant grievants, it is unlikely that he would have done so without the concurrence and approval of Houdteshell. Houdteshell's action indicates that Mountaineer did not have such a policy. Rather, the circumstances indicate that Straight and Houdteshell differed in their appraisal of Courtney's record. I find that the evidence fails to indicate that Mountaineer discriminated against John Courtney for reasons prohibited by the Act.

Straight testified that he did not initially hire Larry Courtney because Courtney applied for work as an equipment operator, and he needed only one employee to work exclusively in that category. Straight testified that Phillip Kelley and Donald Parks (both former Alkire employees, and the latter a committeeman) made similar applications, and that he hired Parks because he was the best qualified, and Kelley because he was also willing to work as a driver. Straight testified that Courtney later reapplied to work as a driver, and was hired in that category. A document introduced in evidence as a list of Mountaineer's employees does not contain Courtney's name, although it does indicate that Parks was the only employee who worked exclusively as an operator. The General Counsel argues in his brief that the Mountaineer application form does not contain an entry for job preference, and that an adverse inference should be drawn against Respondents because they failed to present Courtney's application in evidence. The General Counsel is attempting to shift the burden of proof. The General Counsel failed to produce Larry Courtney as a witness, and did not demand production of his application at the hearing. In light of the failure of the General Counsel to present Courtney as a witness, I credit Straight, and find that Mountaineer did not discriminate against Larry Courtney.

Larry Lantz, Robert Small, and Jim Detamore applied for work with Mountaineer, but were not hired. None was presented as a witness in this case. David Straight testified that he regarded Lantz as an average to below average driver. Straight testified that Lantz had a poor attitude, and that on one occasion when working for Alkire he refused to perform a minor repair on his truck, which he was able to perform, preferring to wait for a mechanic. According to Straight, Dennett Houdteshell felt that Lantz crossed railroad tracks at too fast a rate of speed. Straight testified Small also had a poor attitude, in that he verbally abused Badger supervisors. Straight further testified that he simply overlooked Detamore and that had he considered Detamore he probably would have hired him. Straight's explanation might be considered pretextual but for two significant facts. First, although Detamore signed the September grievance, he was not noticeably vocal about the matter. Rather, he was a quiet person who might easily be overlooked. Second, Straight had considerably more applications than positions to fill, and he was under no legal obligation to give preference to former Alkire drivers or to follow seniority or any other systematic method of hiring. Nevertheless, he informed all of the former Alkire employees that he was taking applications. Judged by objective standards, Straight may have been erroneous or even arbitrary in his selections, but it does not follow from such evidence that Mountaineer was systematically refusing to hire employees who signed the September grievance. Moreover, the evidence does not suggest such a pattern. Of the 13 employees who signed the September grievance, 1 (Kenny Lee) was no longer working for Alkire in December, 4 (John Helmick, Bruce Davis, George Jack, and Ogden Bragg) did not file applications, or otherwise indicated that they did not wish to work for Mountaineer, 5 (Don Parks, Don Oldaker, John Courtney, Larry Courtney, and John McNeely) were hired, and 3 (Robert Small, Jim Detamore, and Larry Lantz) were not hired. The General Counsel also tends to exaggerate the significance of the names which appeared on the grievance. After the grievance was filed, it was approved by all of the union-represented employees, and David Straight was aware of that fact. Nevertheless, union employees who did not sign the grievance but who subsequently approved it were hired by Mountaineer to perform both union and nonunion work. As indicated, I also do not regard as significant the fact that some grievants were not hired earlier than May. Prior to May, there was little union work available, whereas, by May, Badger had resumed full operations, and that time was a crucial one for determining the wage rate. Indeed, the evidence fails to indicate that, prior to May, Straight had any assurance that any person hired to do union work, whether or not formerly employed by Alkire, would not demand the contract rate.

In sum, I find that Mountaineer did not discriminatorily refuse to hire any of the former Alkire employees. Therefore, it is unnecessary to determine whether, by reason of his continuing involvement with the business, Alkire was a joint employer with Mountaineer during the period from February 8 to July 22.

CONCLUSIONS OF LAW

1. At various times material, Respondents were employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents have not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]